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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-699

ABBOTT LABORATORIES, a corporation,
HERBERT M. GROSS, CLARENCE J. ENDICOTT,
ROBERT T. O'DONNELL, ROBERT H. OTTO,
and HARRY W. HOWELL,
individuals, Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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ABBOTT LABORATORIES, a corporation, HERBERT M. GROSS, CLARENCE J. ENDICOTT, ROBERT T. O'DONNELL, ROBERT H. OTTO, and HARRY W. HOWELL,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners Abbott Laboratories, Herbert M. Gross, Clarence J. Endicott, Robert T. O'Donnell, Robert H. Otto, and Harry W. Howell respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on October 2, 1974.

OPINIONS BELOW

The opinion of the court of appeals, not yet reported, is reproduced in Appendix A and is cited as "C.A.Op.A —". The order of the court of appeals denying a petition for rehearing en banc and revising pages 15, 19 and 20 of the opinion, is reproduced in Appendix B and is cited as "C.A.Op.B". The opinion of the district court, 369 F.Supp. 1396 (E.D.N.C. 1973), is reproduced in Appendix C and is

cited as "D.C. Op. ". The joint appendix in the court of appeals is cited as "J.A. "

JURISDICTION

The judgment of the court of appeals for the fourth circuit was entered on October 2, 1974. A timely petition for rehearing en banc was denied on November 5, 1974, and revised pages 15, 19 and 20 of the court's opinion were also filed on that date. This petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where the district court finds that publicity deliberately and solely generated by federal prosecutors creates an inherently suspect trial situation, and the court of appeals agrees that the publicity would have a substantial adverse effect on the impartiality of potential jurors, is the trial court clearly erroneous in exercising its discretion to dismiss the indictment under the rule of *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), *Turner* v. *Louisiana*, 379 U.S. 466 (1965) and *Estes* v. *Texas*, 381 U.S. 532 (1965)?

2. Where the district court finds that nationwide and recurring prejudicial publicity, deliberately and solely generated by federal prosecutors, created an inherently suspect trial situation, must the defendants waive their constitutional rights by requesting a change of venue or continuance, or both, as a prerequisite to dismissal, notwithstanding the Sixth Amendment and this Court's decision in *Barker* v. *Wingo*, 407 U.S. 514 (1972)?

3. Where the district court finds that the special prosecutor deliberately created grand jury bias and prejudice, is it an abuse of discretion for the court to dismiss the indictment?

4. Should not this Court by a review of this case exercise its power of supervision over federal prosecutors whose conduct violated the rules of the district court, the rules of the Department of Justice and the American Bar Association Code of Professional Responsibility, where the court of appeals expressed the "strongest disapproval" of the misconduct and the district court ordered dismissal as the only remedy adequate to protect the rights of the defendants?

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND CANONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

§ 502 of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 352, provides:

> "A drug . . . shall be deemed to be misbranded —
>
> . . .
>
> (j) If it is dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof."

Rule 1.1 of the Rules of the United States District Court for the Eastern District of North Carolina provides:

> "The ethical standards relating to the practice of law in this court shall be the canons of professional ethics of the American Bar Association, now in force, and as hereafter modified or supplemented. . . ."

The American Bar Association Code of Professional Responsibility, DR7-107(B), provides:

> "Trial Publicity
>
> . . .
>
> A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:
>
> . . .
>
> (6) Any opinion as to the guilt or innocence of the accused, the evidence, or merits of the case."

The Rules of the Department of Justice, 28 C.F.R. § 50.2(b), provide:

> "(2) At no time . . . shall personnel of the Department furnish any statement or information which could reasonably be expected to be disseminated by means of public communication, if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial.
>
> "(3) . . . Disclosures should include only incontrovertible, factual matters. . . . In addition, where . . . information relating to the . . . investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public.
>
> "(6) The release of certain types of information generally tends to create dangers of prejudice without serving a significant law enforcement function. Therefore, personnel of the Department should refrain from making available the following:
>
> . . .

"(v) Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial.

"(vi) Any opinion as to the accused's guilt. . . ."

STATEMENT OF THE CASE

A. The Indictment

On May 29, 1973, a federal grand jury in Raleigh, North Carolina, returned the indictment in this case, charging Abbott Laboratories and five individuals with 60 misdemeanors arising out of some 30 shipments of intravenous solutions in interstate commerce. The indictment charged that the intravenous solutions were misbranded and adulterated within the meaning of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq.*

The corporate defendant and the five individual defendants entered pleas of not guilty. The defendants also filed two motions to dismiss based on the misconduct of the federal prosecutors in generating massive prejudicial post-indictment publicity, and in presenting the case to the grand jury. The district court granted both motions and the court of appeals reversed both rulings.

This petition raises the question of the remedy applicable when the trial court finds that the misconduct of the federal prosecutors was (1) sole cause of an inherently prejudicial situation, and (2) created bias and prejudice in the grand jury.

B. The Motion Based on Prejudicial Publicity Generated Solely by the Prosecutors

This motion is concerned solely with publicity deliberately generated by the misconduct of the federal prosecutors which precludes a fair trial. It does *not* involve overreaching by the press, or publicity generated by defendants.

The United States Attorney invited a television reporter and camera crew to his office for an interview within a few hours after the indictment was returned. During the course of the interview, the television reporter asked if any deaths or illnesses were attributed to the drugs. A special prosecutor from the Department of Justice in Washington, who had previously advised the United States Attorney that if the question of deaths came up "you better fudge it" (J.A. 688a), answered the question in the affirmative, saying that "The Center for Disease Control in Atlanta previously reported that nine deaths occurred in 1971." (D.C.Op.C 5). This nine death story was reported that same evening on WRAL-TV, which covers the district in which the case arose. Other nine death stories, attributable to Department of Justice sources in Washington (C.A.Op.A 8), were reported extensively in newspapers throughout the country and on television and radio stations, including the Tobacco Network, a group of 70 stations across North Carolina.

On that same afternoon, the United States Food and Drug Administration (FDA) issued a press release which had previously been prepared by two FDA attorneys, assisted by a public relations officer. The release included these conclusions:

> ". . . Five present or former officials of the Company also were named in the indictment for interstate shipment of intravenous drugs that were unsterile and dangerous to the public health. . . .
>
> "The Center for Disease Control, Atlanta, Georgia, reported 50 deaths from 412 patient episodes during late 1970 and early 1971 from septicemias (blood poisonings) which CDC determined to be associated with the use of contaminated Abbott intravenous solutions."
>
> ". . . These individuals held positions of responsibility with respect to the adulteration and misbranding for the intravenous drugs named in the Indictment. . . ." (J.A. 128a-129a).

The 50 death story received even more extensive newspaper, television and radio coverage throughout the nation than the nine death story. It was disseminated by UPI, AP, NBC, CBS and ABC. The sensational nature of the news resulted in front page articles and headlines in many newspapers.

Defendants filed a motion to dismiss, alleging that this prejudicial pretrial publicity intentionally and solely generated by the prosecutors so infected the community that defendants could not receive a fair trial under the doctrine announced by this Court in *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), *Turner* v. *Louisiana*, 379 U.S. 466 (1965), *Estes* v. *Texas*, 381 U.S. 532 (1965) and *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966). After three days of hearings at which all of the government attorneys and the FDA's public relations officer appeared at length, the district court exercised its discretion to dismiss. The court held that the improper publicity generated solely by the prosecutors had so infected the community that voir dire could not adequately protect the defendants, citing, *inter alia*, this Court's opinions in *Rideau*, *Estes*, *Sheppard* and *Groppi* v. *Wisconsin*, 400 U.S. 505 (1971). The court also held that voir dire was inadequate because of the recurring nature of the publicity, citing the fact that the 50 death story appeared in three eastern North Carolina newspapers even at the relatively insignificant time of the arraignment. (D.C.Op.C 14-15).

The court further held that a continuance would not remedy the situation, following the balancing test of this Court in *Barker* v. *Wingo*, 407 U.S. 514 (1972), and that a change of venue would be a useless gesture because of the nationwide publicity as evidenced by the 225 newspaper articles and transcripts of numerous network and local television and radio news reports referring to the government's nine and 50 death releases. Therefore, dismissal was the "only appropriate remedy." (D.C.Op.C 15-16)

The court of appeals reversed, distinguishing *Rideau* on the ground that in its opinion the publicity in the instant case was "not as devastating." (C.A.Op.A 10). The court ruled that defendants must demonstrate actual prejudice, although the court also said that the prejudicial publicity "could unquestionably be expected to have a substantial adverse effect on the impartiality" of potential jurors. (C.A.Op.A 8).

C. The Motion Based on the Prosecutors' Misconduct in Presenting the Case to the Grand Jury

Defendants also filed a second motion to dismiss, based on prosecutorial misconduct in presenting the case to the grand jury. This motion was based primarily on three "questions" posed by one of the special prosecutors to Robert O'Donnell, one of the defendants in this case, and formerly director of quality control for Abbott Laboratories. The "questions" were:

> "Q. My recollection is, and I think that you can help me with that, they had a couple of dead bodies in Denver from Abbott I.V. solutions, isn't that right?" (Grand Jury Transcript, page 187).
>
> . . .
>
> "Q. Let's see now if we can refresh your recollection with exactly what was at the Henry Ford Hospital in Detroit. I want to show you a photocopy of what is captioned the Detroit Newspaper of March 14, 1971, with the headline that says: Faulty Bottle Caps Blamed in Nine Deaths, the Detroit Free Press of March 16, 1971, Eight Hospital Deaths tied to Tainted Bottle Caps, March 16, 1971, from the Detroit News: Hospital Blood Poison Deaths were linked to Water, and the Detroit News of March 17, Identities of Tainted Fluid Victims Withheld. Let me see if this will help you refresh your recollection about Henry Ford Hospital in Detroit?" (Grand Jury Transcript, pages 187-188).

"Q. Did she tell you the Detroit News were crazy as bed bugs that there was these dead bodies in Detroit from using Abbott I.V. Solutions." (Grand Jury Transcript, page 190).

After hearing at length from the prosecutor who posed the "questions," and reviewing the entire grand jury transcript, the district court also granted this motion to dismiss, holding "as a fact that bias and prejudice were created." (D.C.Op.C 18). The court of appeals reversed on the ground that the nine deaths and 50 deaths data were relevant. (C.A.Op.A 13).

The court of appeals denied the petition for rehearing en banc on November 5, 1974, and simultaneously filed revised pages to make the opinion conform to the charges in the indictment. (C.A.Op.B).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals will have a profound and far-reaching effect upon all future federal criminal prosecutions. The opinion asserts that voir dire can and should be used to attempt to identify the effect on the venire of prejudicial publicity generated deliberately and solely by federal prosecutors. It further imposes on defendants the duty of seeking a venue change or a continuance even though the sole reason for doing so was that the prosecutors deliberately and solely poisoned the venire by creating an inherently prejudicial circumstance. The Sixth Amendment rights of speedy trial in the venue are abridged, subordinated to the will of overzealous or unscrupulous prosecutors.

Further, the decision of the court of appeals abrogates discretionary rulings of the district court which had the effect of supervising the activities of the federal prosecutors, including their conduct before the grand jury. To allow that decision to stand would be to condone prosecutorial misconduct severely condemned by both courts below and to countenance, for the future, improper presentations

by federal prosecutors to grand juries and to the press. A ruling by this Court is essential to give prosecutors needed direction and to give defendants needed protection.

1. The District Court, Following *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), Correctly Exercised Its Discretion to Dismiss the Indictment Upon a Finding That Publicity Generated Deliberately and Solely by Federal Prosecutors Created an Inherently Prejudicial Situation.

Voir Dire

This Court has repeatedly held that where the government creates circumstances which are inherently suspect, prejudice to the accused is presumed, and the Court has refused even to consider information developed through voir dire. Voir dire is a constitutionally inadequate procedure to demonstrate the absence of such prejudice. *Rideau* v. *Louisiana*, 373 U.S. 723 (1963); *Turner* v. *Louisiana*, 379 U.S. 466 (1965); *Estes* v. *Texas*, 381 U.S. 532 (1965); *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966).

In *Rideau* this Court considered an appeal from a conviction where the defendant had been denied a change of venue in the state court. The request for a venue change was occasioned by a televised film of the defendant and a sheriff, in which the defendant confessed to the crimes for which he was later convicted. The trial court conducted voir dire, and was satisfied that the panel of jurors could judge the facts fairly. This Court reversed, declining even to examine the record of voir dire, concluding that the publicity generated with the complicity of the state's officers had fatally infected the venue, making any trial there inherently suspect. Mr. Justice Clark dissented, but said that if the case had arisen in the federal system, he would have concurred with the majority because it would then be the Court's duty, in its supervisory role, to protect the system from such misconduct.

In *Turner*, two deputies who had been assigned to tend to the jury were called as witnesses in the trial. This Court held that this activity of the state was enough to cast doubt on the fairness of the trial, and reversed. No showing of prejudicial information being actually given to the jury was made; the doubt was enough.

In *Estes*, the practice of televising court proceedings was condemned. The Court pointed out that a procedure employed by the state may involve such a probability of prejudice that it is deemed "inherently lacking in due process." Speaking for the Court, Mr. Justice Clark said:

> "This rule was followed in Rideau, supra, and in Turner v Louisiana, 379 US 466, 13 L ed 2d 424, 85 S Ct 546 (1965). In each of these cases the Court departed from the approach it charted in Stroble v California, 343 US 181, 96 L ed 872, 72 S Ct 599 (1952), and in Irvin v Dowd, 366 US 717, 6 L ed 2d 751, 81 S Ct 1639 (1961), where we made a careful examination of the facts in order to determine whether prejudice resulted. In Rideau and Turner the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that *prejudice was inherent* in it.
>
> "In this case it is even clearer that such a rule must be applied. In Rideau, Irvin and Stroble, the pretrial publicity occurred outside the courtroom and could not be effectively curtailed. The only recourse other than reversal was by contempt proceedings. In Turner the probability of prejudice was present through the use of deputy sheriffs who were also witnesses in the case, as shepherds for the jury. *No prejudice was shown but the circumstances were held to be inherently suspect*, and, therefore, such a showing was not held to be a requisite to reversal. Likewise in this case the application of this principle is especially appropriate. Television in its present state and by its very nature, reaches into a

> variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced. This was found true in Murchison, Tumey, Rideau and Turner. *Such outward circumstances as were found in those cases are inherently bad and prejudice to the accused was presumed. . . .*" 381 U.S. at 543-544 (emphasis added).

In *Sheppard*, the trial court attempted to protect the defendants against unfairness caused by a flood of publicity, but this Court reversed, quoting the *Estes* opinion for the proposition that the Constitution condemns a trial in which the state has employed procedures which create a probability that prejudice will result.

The instant case presents an even clearer situation for application of the inherently suspect doctrine for three reasons:

> (a) Each of the four cited cases arose in a state prosecution. The instant case involves the federal criminal justice system, over which this Court exercises supervision.
>
> (b) In the four cited cases, the inherently prejudicial circumstances were created either by persons who were presumably insensitive to the trial process (*Rideau*) or in trial situations in which courts conceivably could have limited the harm done (*Turner, Estes, Sheppard*). In this case, the harm caused by federal prosecutors' "conscious, deliberate" statements in violation of the rules of the court, the department and the profession (C.A. Op. A 8), was done before trial and could not have been tempered by protective procedures.
>
> (c) In the four cited cases, the sources of prejudice were the acts or omissions of state officers. In the instant case, the sources of the prejudicial publicity were the Department of Justice and FDA, widely known and trusted federal agencies that enjoy public confidence.

The court of appeals said the principles of *Rideau* did not apply because the publicity in the instant case was "not as devastating" as in *Rideau*. (C.A.Op.A 10). This rejection of the trial court's finding that the prejudicial publicity would have a substantial adverse effect upon the trial process was improper. Moreover, the court of appeals expressly agreed that the trial process was substantially affected by the prosecutors' misconduct:

> "We accept, without question, that the pretrial publicity in this case was prejudicial and highly inflammatory. The 'nine deaths' and 'fifty deaths' stories could unquestionably be expected to have a substantial adverse effect on the impartiality of many persons in the community from which a jury to try defendants would be drawn." (C.A.Op.A 8).

Unless the trial court's decision is clearly erroneous, its discretionary acts relating to trial prejudice should not be second-guessed by the court of appeals. *Marshall* v. *United States*, 360 U.S. 310 (1959).

The district court concluded:

> "The only appropriate remedy is dismissal. This is, of course, an extreme penalty to impose on the government. It is, however, imposed because the government, through two of its separate agencies, solely generated the prejudicial publicity. As powerful and efficient as our government is, or can be, its laws and procedures do not have to be prostituted by prejudicial publicity 'leaked' to the press in order to obtain convictions, especially criminal misdemeanor convictions." (D.C. Op.C 16).

We urge this Court to review this case, to delineate the permissible bounds of conduct of federal prosecutors, and to put a capstone on the *Rideau*, *Turner* and *Estes* line of cases.

2. The District Court, Following *Barker* v. *Wingo*, 407 U.S. 514 (1972), and Citing the Sixth Amendment, Correctly Dismissed the Indictment Upon a Finding That Prejudicial Publicity Intentionally and Solely Generated by Federal Prosecutors Precluded Fair Trial and Was Nationwide and Recurring.

Change of Venue

In addition to voir dire, the traditional remedies available to defendants to cure situations prejudicial to fair trial are change of venue and continuance. The district court found that since the nine death and 50 death stories had appeared in at least 225 newspapers, and on numerous network and local television and radio news reports, "a change of venue would be a useless gesture." The court of appeals held that a defendant who declines to waive his Sixth Amendment right to be tried in the state and district where the crime is alleged to have been committed must

> ". . . demonstrate the existence of actual prejudice far more convincingly than was done in the case at bar. A defendant who has unused means to protect his rights should not lightly be granted the extreme remedy of dismissal of the charges against him on less than a conclusive showing that the unused means would be ineffective." (C.A.Op.A 12).

The court of appeals rationale, we submit, contravenes the Sixth Amendment guarantee that defendants have a right to be tried in the state and district in which it is alleged that the crimes occurred. Surely it cannot be the law that defendants must be prepared to waive their Sixth Amendment rights before the *Rideau* doctrine is invoked, particularly where the sole trigger for the waiver is the prosecutors' misconduct. Furthermore, even the government has not suggested that there is any district in the United States which has not been subjected to the nine death and 50 death prejudicial statements.

In some instances a change of venue might be consistent with a defendant's Sixth Amendments rights—as in *Rideau* itself; but where it is inconsistent, surely the *Rideau* doctrine still applies, particularly where the offending prosecutors are federal officials. This issue alone warrants review by this court.

Continuance

This Court in *Barker* v. *Wingo*, 407 U.S. 514 (1972), adopted "a balancing test, in which the conduct of both the prosecution and the defendant are weighed." The district court here found that "the government generated publicity is the sole justification offered for delay," and held that under *Barker* a continuance "would not only be improper but would also deny to the defendants their constitutional right to a speedy trial." The court also noted the fact that the 50 death story is now in newspaper morgues throughout the country, and would be recurring. (D.C.Op.C 16).

The court of appeals, however, held that a defendant who declines to waive his Sixth Amendment right to a speedy trial is placed under ". . . a heavy burden of proving actual prejudice resulting from the publicity as a basis for dismissal of the charges against him. . . ." (C.A.Op.A 12).

This rationale again makes the *Rideau* doctrine conditional on waiving a constitutional right. The court of appeals is saying that unless defendants waive both of their Sixth Amendment rights, *Rideau* is inapplicable and defendants must "demonstrate the existence of actual prejudice" (C.A. Op.A 12) and have a "heavy burden of proving actual prejudice." (C.A.Op.A 12).

This reasoning, we submit, is wrong. *Rideau* and its progeny do not in any way indicate that defendants must waive their Sixth Amendment rights as a prerequisite to application of the doctrine. Indeed a threshold requirement of waiver of constitutional rights would emasculate *Rideau*.

Furthermore, under *Barker*, as applied to the facts of this case, there is no justification whatsoever for suggesting that defendants have an obligation to seek a continuance.

The Sixth Amendment precludes the necessity for seeking a change of venue. *Barker* and the Sixth Amendment preclude the necessity for seeking a continuance. The *Rideau* inherently suspect situation exists. Hence the district court was correct in exercising its discretion to dismiss. The impact of the court of appeals decision on the Sixth Amendment's protections would be devastating, subordinating the rights of all defendants to the misconduct of federal prosecutors bold or careless enough to poison the trial process. This novel construction of the Sixth Amendment requires review.

3. The District Court Did Not Abuse Its Discretion in Dismissing the Indictment Upon a Finding That Grand Jury Bias and Prejudice Were Deliberately Created by a Federal Prosecutor.

Defendants' motion to dismiss based on prosecutorial misconduct before the grand jury was also granted by the district court and reversed by the court of appeals. The district court found

> ". . . as a fact that bias and prejudice were created when Mr. Epstein [a federal prosecutor] repeatedly referred to deaths and 'dead bodies,' and exhibited headlines of a newspaper story in a Detroit newspaper, which referred to deaths from Abbott I.V. solutions. Deaths were also mentioned on the day the grand jury returned the Indictment, to what extent they were mentioned is unknown because there was no transcript made of that last meeting. To raise the spector of homicide before the grand jury in an effort to obtain an indictment under an act which requires no *mens rea* is unconscionable conduct." (D.C.Op.C' 18).

The court of appeals' reversal is based on the court's opinion that evidence of deaths was relevant to the "dangerous to health" charge of the indictment under 21 U.S.C. § 352(j).

The court of appeals overlooks two factors:

First, three government attorneys declared in open court that deaths were *not* relevant to the case, even though they knew the indictment included 30 charges under 21 U.S.C. § 352(j):

(a) The United States Attorney, Mr. McNamara, said:

> ". . . [T]his Abbott indictment does not concern any deaths or illnesses, that is not a part of this case . . . ." (J.A. 330a).

(b) The general counsel of FDA, Mr. Hutt, told the trial court:

> "I am sure with Mr. McNamara, the deaths were not relevant." (J.A. 625a).

(c) The deputy chief, Consumer Affairs Section Antitrust Division, Department of Justice, Mr. Epstein, the Washington lawyer assigned to this case, said:

> "Now this nine deaths was a factual report of the number of mortalities which that branch of the Government obtained from its reporting service. I don't know if it is true fact or if it is Alice in Wonderland fantasy." (J.A. 387a).

The presumptive reason for these statements is that the government attorneys had no intention to offer any evidence that the intravenous solutions listed in the indictment caused any deaths or illnesses.

Second, even if the conclusion of the court of appeals that deaths are relevant is accepted, the inflammatory manner in which the questions were put to the grand jury witness requires dismissal. According to the district court's finding, use of words such as "dead bodies in Denver from Abbott

I.V. solutions," and "dead bodies in Detroit from using Abbott I.V. solutions" *in fact* created bias and prejudice in the grand jury. Reading inflammatory headlines to the grand jury compounded the fatal error.

The trial court exercised its discretion in granting the grand jury motion to dismiss. Reversal of this finding as "clearly erroneous" is appropriate only when there is no evidence to support the finding. *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948). The trial court made its finding after hearing at length from the prosecutors who attempted to explain their conduct. Only after three days of hearings and full briefing did the court exercise its discretion. The court of appeals should have intervened only if the finding of the district court was wholly unsupported by evidence. *United States* v. *Johnson*, 327 U.S. 106, 111-112 (1946).

4. This Court Should Review This Case and Exercise its Power of Supervision Over Federal Prosecutors Whose Conduct Violated the Rules of the District Court, the Rules of the Department of Justice and the American Bar Association Code of Professional Responsibility, Where the Court of Appeals Expressed the "Strongest Disapproval" of the Misconduct and the District Court Ordered Dismissal as the Only Remedy Adequate to Protect the Rights of the Defendants.

The misconduct of the federal prosecutors permeates this entire proceeding, from the grand jury to the post-indictment publicity. Both courts below condemned this reprehensible conduct in the strongest language. The court of appeals said:

> "We accept, without question, that the pretrial publicity in this case was prejudicial and highly inflammatory. The 'nine deaths' and 'fifty deaths' stories could unquestionably be expected to have a substantial adverse effect on the impartiality of many persons in the community from which a jury to try defendants would

> be drawn. And the case is not made easier by the fact that, even if not intentionally inflammatory, the 'fifty deaths' story appears to have been a deliberate, conscious statement by FDA, and the 'nine deaths' story a conscious, deliberate statement of the Department of Justice in Washington, although probably an inadvertent one by the prosecutors in North Carolina. Irrespective of the outcome of this case, we join in the district court's condemnation of this conduct and express our strongest disapproval that highly placed legal officers would make a statement of this import with regard to a pending criminal prosecution, and even more so that FDA, which had referred the matter to the Department of Justice, would issue a press release containing such prejudicial material." (C.A.Op.A 8).

The prosecutors' conduct clearly violated the rules of the United States District Court for the Eastern District of North Carolina, the rules of the Department of Justice, and the American Bar Association Code of Professional Responsibility, the applicable portions of which are quoted above on pages 3-5.

The only question is one of remedy. The district court, after reviewing the entire grand jury transcript, and after hearing from all of the prosecutors in open court for three days, concluded that the only appropriate remedy was dismissal. The court acknowledged that the remedy was extreme, but imposed it because the widespread prejudicial publicity was solely generated by the prosecutors, and traditional safeguards to fair trial would not be constitutionally adequate.

Defendants seek to protect their constitutional rights which this Court has carefully defined in *Rideau* and the cases which follow it, and in *Barker* v. *Wingo*, *supra*. In addition, in *United States* v. *Grassia*, 354 F.2d 27, 29 (2d Cir. 1963), Judge Friendly strongly suggested that dismissal can be proper for "general therapeutic purposes."

Where federal prosecutors are the sole generators of the inherently suspect circumstances, and when the entire proceeding is contaminated, beginning with the grand jury, a proper case arises for this Court to exercise its supervisory powers, whether for therapeutic purposes or otherwise.

> "When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them." *Donnelly* v. *DeChristoforo*, — U.S. —, 40 L.Ed. 2d 431, 437 (1974).

As Mr. Justice Frankfurter said in his concurring opinion in *Irvin* v. *Dowd*, 336 U.S. 717, 729-730 (1961):

> ". . . One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him. . . .
>
> "Not a term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts—too often, as in this case, with the prosecutor's collaboration — exerting pressures upon potential jurors before trial and even during the course of trial, thereby making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court. . . ."

We know of no other case in which conscious overreaching has so permeated a judicial proceeding, beginning with the grand jury stage. The court of appeals opinion, while

expressing the strongest disapproval of the federal prosecutors' conduct, nevertheless reaches a conclusion which, if allowed to stand as precedent, will necessarily expand the opportunity for such practices to invade the fabric of the entire federal judicial system.

We urge this Court to take this opportunity to exercise its supervisory powers over the federal criminal trial process and repudiate the court of appeals' conclusion that defendants who are unwilling to waive their rights under the Sixth Amendment are to have no effective protection against an inherently prejudicial trial environment deliberately created by overreaching federal prosecutors.

CONCLUSION

For the reasons stated herein Petitioners pray that this petition be granted and a Writ of Certiorari issue to review the judgment of the court of appeals.

Dated: December 4, 1974.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 74-1230

UNITED STATES OF AMERICA,

Appellant,

v.

ABBOTT LABORATORIES, a corporation, HERBERT M. GROSS, CLARENCE J. ENDICOTT, ROBERT T. O'DONNELL, ROBERT H. OTTO, and HARRY W. HOWELL, individuals,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilson. John D. Larkins, Jr., District Judge.

Argued June 4, 1974 Decided October 2, 1974

Before WINTER, BUTZNER and WIDENER, *Circuit Judges.*

Howard E. Shapiro, Attorney, United States Department of Justice, (Thomas E. Kauper, Assistant Attorney General, and Roger B. Andewelt, Attorney, United States Department of Justice on brief) for Appellant; George M. Burditt for Abbott Laboratories and Thomas F. Ellis for Herbert M. Gross (James R. Phelps and Burditt and Calkins and James C. Little and Hatch, Little, Bunn, Jones, Few and Berry on brief) for Appellee Abbott Laboratories;

(Maupin, Taylor and Ellis on brief) for Appellee Herbert M. Gross; (Lucas, Rand, Rose, Meyer, Jones and Orcutt and Louis B. Meyer on brief for Appellee Clarence J. Endicott); (Lindsay C. Warren, Jr., John Kerr, III, and Taylor, Allen, Warren and Kerr on brief for Appellee Robert T. O'Donnell); (C. Kitchin Josey and Josey and Vaughn on brief for Appellee Robert H. Otto); (John R. Jolly, Jr., and Spruill, Trotter and Lane on brief for Appellee Harry Howell).

WINTER, *Circuit Judge:*

The government appeals from the district court's dismissal of a sixty-count indictment charging Abbott Laboratories (Abbott) and five of its current or former employees with causing the introduction into interstate commerce of adulterated and misbranded intravenous solution drugs in violation of 21 U.S.C. § 331(a). The district court dismissed the indictment (1) because of prejudicial pretrial publicity released by the special prosecutor in answer to an inquiry by a newspaper reporter, prejudicial publicity contained in a press release originating from the Department of Justice, and prejudicial publicity contained in another press release originating from the Food and Drug Administration (FDA), and (2) because the grand jury which returned the indictment, at the instance of Department of Justice attorneys, considered "prejudicial and inflammatory" information not relevant to its inquiry, which caused it to be biased in derogation of the constitutional rights of the defendants. We think that under the facts of the case, dismissal of the indictment was too drastic a remedy for what misconduct on the part of the government occurred and that the challenged evidence considered by the grand jury was relevant to its investigation and proper to be considered by it. We reverse and remand the case for further proceedings.

I.

In December, 1970, the Center for Disease Control (CDC) of the United States Public Health Service investigated an

increase in the incidence of blood poisoning among hospital patients. CDC concluded that between October, 1970, and March 1, 1971, one hundred fifty cases of blood poisoning and nine deaths had occurred in eight hospitals among patients who had received intravenous fluid therapy employing intravenous fluids and intravenous fluid systems manufactured by Abbott. CDC investigators found bacterial contamination of the cap liner in unopened Abbott bottles of intravenous solutions, and they postulated that "the organisms can enter the fluid from the plastic cap liners when the caps are opened and replaced while the bottle is held for later use." The report of these findings received national media coverage describing the illnesses and deaths and isolation of the "guilty germ" in the cap liner of Abbott bottles. On March 22, 1971, Abbott issued a nationwide recall of its intravenous solutions.

FDA recommended to the Department of Justice that Abbott and those of its employees "responsible" for distribution of the allegedly contaminated intravenous solutions be prosecuted. The matter was presented to a grand jury in a district in which Abbott manufactures intravenous solutions, and the indictment was returned on May 29, 1973.

A. Post-Indictment Publicity.

As soon as the indictment was returned, the United States Attorney for the Eastern District of North Carolina notified the news media that he had a press release concerning the indictment. The news department of a Raleigh television station requested an interview with him. The request was granted and the interview held at about 2:00 p.m. in his office. Two special prosecutors from the Justice Department and an attorney from FDA were also present. The interview was conducted in three stages by a television newswoman from the local station. There was first an off-camera interrogation of the government attorneys by the correspondent. Then there was a taped inter-

view of the U.S. Attorney, at which he answered questions that had been submitted in advance. After the taping session, the correspondent continued to interrogate the attorneys for a time.

During the pretaping interrogation, the correspondent asked whether any deaths or illnesses were attributed to the misbranded drugs. One of the special prosecutors replied that "the Center for Disease Control in Atlanta previously reported that nine deaths occurred in 1971." During the subsequent taping session, the correspondent asked the same question of the U.S. Attorney. Not expecting this question to be asked, he replied that the indictment had nothing to do with any deaths. Following the taped interview, the correspondent continued to ask questions concerning deaths attributable to Abbott's intravenous solution. The answers, in substance, provided the same information as the answer quoted above.

On the six o'clock news that day, the Raleigh TV station broadcast a news report concerning the indictment, which contained the following statements:

> Nine deaths and four hundred illnesses have been attributed to contaminated drugs made by a North Carolina company.
>
> * * *
>
> . . . the drugs were manufactured by the Abbott Laboratories Hospital Products Division of Rocky Mount.

The taped interview was also broadcast on this program, but the U.S. Attorney's statement that the indictment had nothing to do with any deaths was omitted.

On the same day, United Press International (UPI) ran a story citing sources in the Justice Department in Washington, containing the following statement:

> A federal grand jury has returned criminal indictments against Abbott Laboratories, Inc. and five of its present or former employees on charges involving al-

> legedly contaminated intravenous fluid linked to nine deaths and hundreds of injuries, the Justice Department announced Tuesday.

The circumstances make it clear that the remarks of those present at the interview in the U.S. Attorney's office in Raleigh were *not* the source of this news release. Nothing further is apparently known about the actual source of this release than that which appears on its face. This UPI release received the wide publication that could be expected in the case of a wire service of this type.

On May 29, 1973, some hours after the indictment was handed down, the FDA issued a press release in Washington, D.C., containing the following statements:

> Five present or former officials of the company also were named in the indictment for interstate shipment of intravenous drugs that were unsterile and dangerous to public health.
>
> * * *
>
> The Center for Disease Control, at Atlanta, Georgia, reported fifty deaths from four hundred and twelve patient episodes during late 1970 and early 1971 from septicemias (blood poisonings) which CDC determined to be associated with the use of contaminated Abbott intravenous solutions.
>
> * * *
>
> These individuals held positions of responsibility with respect to the adulteration and misbranding for the intravenous drugs named in the indictment.

Both the UPI "nine deaths" release and the FDA "fifty deaths" release received wide coverage throughout the nation in the television, radio and printed media at the time of the indictment. The "nine deaths" story arising out of the interview with the U.S. Attorney reached the viewers of WRAL-TV of Raleigh, North Carolina, who are spread

throughout many of the counties of the Eastern District of North Carolina.

B. Proceedings Before the Grand Jury.

The proof shows that the death or possible death of persons who had received Abbott's intravenous solutions was mentioned before the grand jury in three separate instances. The first was during the examination of preliminary witnesses, and the last was during the prosecutor's discussion of the recommended indictment. No transcript for these instances is in the record or available, and further details cannot be stated.

The second instance was during the interrogation of Robert O'Donnell, Abbott's Director of Quality Assurance, who was named as a defendant in the indictment subsequently returned. Mr. O'Donnell was questioned about an investigation conducted by Abbott in a Detroit hospital which purportedly exculpated Abbott or seriously questioned the findings of CDC. He was asked if that hospital had "had a couple of dead bodies . . . from Abbott I.V. solutions," and O'Donnell said that he could not recall. He was then questioned about certain Detroit newspaper accounts concerning hospital deaths resulting from tainted bottle caps, in an effort to refresh his recollection. Finally, he was asked if his investigator had said that the Detroit newspaper was "crazy as bedbugs" when it reported deaths in Detroit from the use of Abbott solutions. Mr. O'Donnell denied the statement by the investigator.

C. Proceedings in the District Court.

Defendants sought dismissal of the indictment by two motions. On July 13, 1973, they moved to dismiss the indictment on the grounds that the prejudicial publicity engendered by the "nine deaths" story arising out of the WRAL-TV interview with the prosecutor and, independently, out of the UPI release in Washington, and by the FDA's "fifty deaths" release prevented the defendants from re-

ceiving a fair trial. On October 3, 1973, the defendants moved that the indictment be dismissed on the ground that the statements made by the special prosecutor before the grand jury concerning the deaths allegedly caused by Abbott's intravenous solutions were highly prejudicial and deliberately inflammatory. At the hearing, numerous affidavits, exhibits and memoranda were submitted on both motions. On December 13, 1973, the district court entered an order dismissing the indictment as to all defendants both on the ground that prejudicial publicity precluded a fair trial and on the ground that prosecutorial misconduct before the grand jury invalidated the indictment. In its accompanying memorandum, the district court made the following findings in support of its dismissal of the indictment because of prejudicial pretrial publicity:

> (1) That defendants had demonstrated that the "nine deaths" and "fifty deaths" stories had sufficiently infected the community so that voir dire could not be used to guarantee the defendants' constitutional right to a fair trial.
>
> (2) That a continuance would not protect defendants' right to a fair trial because of the likely recurrent nature of the prejudicial publicity—i.e., the "nine deaths" and "fifty deaths" stories would be continually resurrected at each point at which the case was brought on for trial—and because a continuance to remedy the effect of pretrial publicity caused by the prosecutors would prejudice defendants' constitutional right to a speedy trial.
>
> (3) That a change of venue would not protect defendants' right to a fair trial because the government failed to suggest any district in the United States to which the trial could be transferred which had not been infected with the prejudicial publicity.

Throughout, the defendants have maintained that the "nine deaths" and "fifty deaths" stories were false and prejudi-

cial. They claim that it cannot be established that any septicemia deaths were caused by microorganisms that were contained in the cap liners of Abbott's intravenous solutions when they left the Rocky Mount, North Carolina, plant. They further assert that even if these charges were true, evidence that the intravenous solutions in question had caused septicemia deaths would be inadmissible in a trial upon the charge of distributing adulterated and misbranded drugs in interstate commerce. The district court made no finding of whether the charges in the "nine deaths" and "fifty deaths" stories were true.

II.

We accept, without question, that the pretrial publicity in this case was prejudicial and highly inflammatory. The "nine deaths" and "fifty deaths" stories could unquestionably be expected to have a substantial adverse effect on the impartiality of many persons in the community from which a jury to try defendants would be drawn. And the case is not made easier by the fact that, even if not intentionally inflammatory, the "fifty deaths" story appears to have been a deliberate, conscious statement by FDA, and the "nine deaths" story a conscious, deliberate statement of the Department of Justice in Washington, although probably an inadvertent one by the prosecutors in North Carolina. Irrespective of the outcome of this case, we join in the district court's condemnation of this conduct and express our strongest disapproval that highly placed legal officers would make a statement of this import with regard to a pending criminal prosecution, and even more so that FDA, which had referred the matter to the Department of Justice, would issue a press release containing such prejudicial material. We are presented, however, with the question of whether this misconduct on the part of the government was so prejudicial to the defendants' right to a fair trial that it should be redressed by dismissal of the indictment with the consequent effect that the interests of society in enforcement of the laws should be terminated before the guilt or inno-

cence of the defendants has been determined. What disciplinary action should be taken in this or any future case against responsible government employees or officials for the patent threat to defendants' rights to a fair trial is not a question before us, although it may subsequently become the subject of separate proceedings.

No case of which we are aware, nor any to which we have been referred, holds that, without resort to the traditional means of effective protection of a defendant's right to a fair trial, i.e., voir dire, change of venue, continuance, pretrial publicity has been so inflammatory and prejudicial that a fair trial is absolutely precluded and an indictment should be dismissed without an initial attempt, by the use of one or more of the procedures mentioned, to see if an impartial jury can be impanelled. In Wansley v. Slayton, 487 F.2d 90 (4 Cir. 1973) we expressed confidence in the efficacy of voir dire examination as a protection against prejudicial publicity. There we concluded that the combination of (1) a lapse of time between prejudicial publicity and trial, and (2) an extensive and skillful voir dire examination of jurors was sufficient to overcome the prejudice created when a black defendant charged with raping three white women was given widespread, intensive prejudicial pretrial publicity, including a report that he had confessed to the authorities and had retraced his trail of crime. Of course in the instant case, the factor of governmental misconduct in initiating prejudicial pretrial publicity is greater than it was in *Wansley;* but this is a distinction, for present purposes, largely without a difference, since the outcome of the case, as we see it, depends upon whether fairness to defendants may still be accomplished and not whether misconduct of the government warrants punishment which also forfeits the rights of society. United States v. Milanovich, 303 F.2d 626 (4 Cir. 1962), cert. den., 371 U.S. 876 (1962).

Rideau v. Louisiana, 373 U.S. 723 (1963), suggests that pretrial publicity may be so prejudicial that no trial by jury drawn from the community in which it was dissemi-

nated would be constitutionally fair, and thus that the prosecution should be quashed if a change of venue to an unpolluted community is not possible. In *Rideau*, it was held that the defendant must be tried by a jury drawn from a community which had not been exposed to telecasts of the defendant's confessing his guilt to the authorities; and the Court reached this result "without pausing to examine a particularized transcript of voir dire examination of the members of the jury" to determine its effectiveness. 373 U.S. at 727. Implicit, if not explicit, in *Rideau* is the notion that defendant might obtain a fair trial by a change of venue, and, accordingly, the Court permitted Rideau to be retried and did not require the prosecution to be terminated. Should a case arise where prejudicial pretrial publicity is so widespread and pervasive that a change of venue would be ineffective to assure a defendant a fair trial, *Rideau* may mean that it is proper to quash a prosecution.

Whatever may be the ultimate implications of *Rideau*, we do not think that in this case the district court's finding that voir dire could not be used to guarantee defendants' right to a fair trial can be sustained. The prejudicial publicity in the instant case was not as devastating as the prejudicial publicity in *Rideau*. In *Rideau*, prejudice was committed by pretrial disclosure of the most persuasive evidence of guilt—the defendant's own confession. Here, the prejudice may have affected the purity of the jury's fact-finding process, but it was not evidence of guilt, nor evidence admissible at trial. It is not inconceivable that prospective jurors, previously exposed to the publicity, had forgotten it, United States v. Bowe, 360 F.2d 1, 11-12 (2 Cir. 1966); or, remembering it, could truthfully and persuasively answer on voir dire that they would be unaffected in their deliberations by their recollection, especially since what was disclosed pretrial would not be in evidence before them and they would not be required to pass on whether it had been proved and the weight to be given it. See Irvin v. Dowd, 366 U.S. 717, 722-23 (1961). The district court's concern that the publicity might be revived, and the curative effect of the pas-

sage of time between original dissemination and trial dissipated if the case were set for trial, is a valid one. But it does not follow that prospective jurors would necessarily receive a second exposure to the "nine deaths" and "fifty deaths" publicity. Sheppard v. Maxwell, 384 U.S. 333 (1966), teaches that the district court has wide powers to protect a jury from infection to insure defendants a fair trial, and it is its duty to exercise them to accomplish those results. In sum, we hold that, although in a proper case *Rideau* may not require resort to voir dire and proof of the results thereof as proof essential to a finding that a defendant may not receive a fair trial so as to warrant dismissal of an indictment, such proof is essential in the instant case. Consequently, the district court's finding that a fair trial was impossible and its legal conclusion that the indictment should be dismissed cannot stand, since voir dire was not employed.

Because of what we have concluded with respect to voir dire, elaborate discussion of the curative devices of change of venue and continuance is unnecessary. A few comments, however, are in order. Change of venue is a recognized device to overcome pretrial prejudicial publicity because it is not unreasonable to assume that pretrial publicity may receive less dissemination elsewhere than in the jurisdiction in which charges are lodged, or, even if it receives the same degree of dissemination elsewhere, that its prejudicial effect is less than in the jurisdiction where it has special local interest. In many instances change of venue is resorted to only after voir dire establishes that the inability to obtain a fair trial as a result of pretrial publicity exists. Wright, Federal Practice and Procedure, § 342, pp. 627-28 (1969). Because of a defendant's sixth amendment right to be tried in the district where the crime was allegedly committed, Rule 21, F.R.Cr.P., conditions a change of venue, *inter alia*, upon the defendant's request therefor. Absent the request, a change of venue may not be ordered, Parr v. United States, 351 U.S. 513, 523 (1956) (Warren, C.J., dissenting). Although a change of venue under Rule 21 can-

not be imposed on a defendant against his will, the availability of a change of venue as a corrective device undergirds the requirement that a defendant, who declines to request a change of venue but who seeks dismissal of an indictment against him because of allegedly prejudicial pretrial publicity, demonstrate the existence of actual prejudice far more convincingly than was done in the case at bar. A defendant who has unused means to protect his rights should not lightly be granted the extreme remedy of dismissal of the charges against him on less than a conclusive showing that the unused means would be ineffective.

Similarly, a continuance is another corrective device since it allows possible prejudice to fade away from the dimming of recollections. But there are decided limitations on its use stemming from a defendant's sixth amendment right to a speedy trial. Whether in a given case the granting of a continuance would infringe a defendant's right to a speedy trial can be determined only by a balancing process, a significant factor of which is the reason the continuance is needed. Barker v. Wingo, 408 U.S. 514, 530-31 (1972). If a defendant does not request a continuance, or acquiesce in the government's request therefor, the fact that the continuance is required because of the government's misconduct in disseminating pretrial prejudicial publicity is a factor weighing heavily against its grant, although not one which is conclusive. Geagan v. Gavin, 181 F.S. 466 (D. Mass. 1960), aff'd 292 F.2d 244 (1 Cir. 1961). However, the existence of this remedy again undergirds the placing of a heavy burden of proving actual prejudice resulting from the publicity as a basis for dismissal of the charges against him on the part of a defendant who declines to request or join in a request for a reasonable continuance.

III.

We disagree that the indictment should be dismissed because of irrelevant prejudicial and inflammatory information brought to the attention of the grand jury which

indicted defendants. Our disagreement follows from our conclusion that the "nine deaths" and "fifty deaths" data was relevant.

The grand jury was investigating possible violations of the federal drug laws. Although defendants were *not* indicted for a violation of 21 U.S.C. § 352(j), whether it had been violated was certainly within the scope of the grand jury's investigation. That statute deems a drug "misbranded" if it is "dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof." Evidence that use of Abbott's intravenous solutions may have been the cause of deaths which occurred manifestly would establish that the solutions were "dangerous to health." Especially is this so when it is remembered that the proceedings were before a grand jury where the standard of proof was one of probable cause and where strict rules of evidence, applicable at trial, were not fully operative. United States v. Calandra, ____ U.S. ____ (January 8, 1974); Costello v. United States, 350 U.S. 359 (1956); Lawn v. United States, 355 U.S. 339 (1958); United States v. Johnson, 419 F.2d 56, 58 (4 Cir. 1970), cert. den., 397 U.S. 1011 (1970). Thus, relevancy would not depend upon a conclusive showing, or a showing beyond a reasonable doubt, that the deaths did result from contamination of Abbott's intravenous solutions. The grand jury was at liberty to indict if it concluded that there was probable cause to believe the existence of the fact; the ultimate determination of the fact would be made at trial. The fact that the grand jury concluded not to indict under § 352(j) because it was not asked to do so, or for another reason, would not destroy relevancy to the investigation it was conducting. See Branzburg v. Hayes, 408 U.S. 665, 701 (1972).

Defendants *were* indicted under 21 U.S.C. § 331(a), which prohibits the introduction of any drug "that is adulterated or misbranded." While § 331(a) prescribes a crime of which scienter is not a necessary element, it does not fol-

low that, in addition to Abbott, every employee of Abbott would have potential criminal liability; rather, only those who share in the responsibility of distributing adulterated or misbranded drugs in interstate commerce are potentially criminally liable. United States v. Dotterweich, 320 U.S. 277, 281, 284 (1943); United States v. Park, ___ F.2d ___ (4 Cir., June 28, 1974). "Responsibility" in turn depends upon knowledge, and if knowledge is established it depends further on the action or nonaction of the officer or employee after he has obtained knowledge. Thus, we think that an inquiry to Mr. O'Donnell of whether he had knowledge from various sources of the charge that Abbott solutions caused deaths, as a prelude to the ultimate inquiry of what action he took with respect thereto, was relevant to the proceedings.

The district court found that the primary purpose of references to deaths before the grand jury was to influence the jurors and arouse their prejudice against defendants. We think this finding clearly erroneous. The record is devoid of direct evidence to support it. At best it is only an inference drawn by the district court from the premise that the references were irrelevant. But, as to the latter, we have concluded otherwise and hence the basis from which inference was drawn ceases to exist.

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1230

UNITED STATES OF AMERICA,

Appellant,

v.

ABBOTT LABORATORIES, a corporation,
HERBERT M. GROSS, CLARENCE J. ENDICOTT,
ROBERT T. O'DONNELL, ROBERT H. OTTO,
and HARRY W. HOWELL, individuals,

Appellees.

ORDER

The petition for rehearing of Abbott Laboratories, et al., including a suggestion for rehearing in banc, has been read and considered. No judge has requested a poll on the suggestion for rehearing in banc. With the concurrence of Judge Butzner and Judge Widener, said petition be, and it is hereby, denied.

It is further ORDERED, however, that pages 15, 19 and 20 of the opinion heretofore filed be, and they are hereby, withdrawn, and new pages 15, 19 and 20, attached hereto, be, and they are hereby, filed in lieu thereof.

For the Court:

(Signed) HARRISON L. WINTER
United States Circuit Judge

A True Copy, Teste:
WILLIAM K. SLATE, II, Clerk
By FAYE CHLORIE
Deputy Clerk

pretrial disclosure of the most persuasive evidence of guilt —the defendant's own confession. Here, the prejudice may have affected the purity of the jury's fact-finding process, but it was not direct evidence of guilt, nor even evidence necessarily admissible at trial. It is not inconceivable that prospective jurors, previously exposed to the publicity, had forgotten it, United States v. Bowe, 360 F.2d 1, 11-12 (2 Cir. 1966); or, remembering it, could truthfully and persuasively answer on voir dire that they would be unaffected in their deliberations by their recollection. See Irvin v. Dowd, 366 U.S. 717, 722-23 (1961). The district court's concern that the publicity might be revived, and the curative effect of the passage of time between original dissemination and trial dissipated if the case were set for trial, is a valid one. But it does not follow that prospective jurors would necessarily receive a second exposure to the "nine deaths" and "fifty deaths" publicity. Sheppard v. Maxwell, 384 U.S. 333 (1966), teaches that the district court has wide powers to protect a jury from infection to insure

The grand jury was investigating possible violations of the federal drug laws. Defendants were indicted, *inter alia*, for a violation of 21 U.S.C. § 352(j): whether it had been violated was certainly within the scope of the grand jury's investigation. That statute deems a drug "misbranded" if it is "dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof." Evidence that use of Abbott's intravenous solutions may have been the cause of deaths which occurred manifestly would establish that the solutions were "dangerous to health." Especially is this so when it is remembered that the proceedings were before a grand jury where the standard of proof was one of probable cause and where strict rules of evidence, applicable at trial, were not fully operative. United States v. Calandra, — U.S. — (January 8, 1974); Costello v. United States, 350 U.S. 359 (1956); Lawn v. United States, 355 U.S. 339 (1958); United States v. Johnson, 419 F.2d 56, 58 (4 Cir. 1970), cert. den., 397 U.S. 1010 (1970). Thus, relevancy would not depend upon a conclusive showing, or a showing beyond a reasonable doubt, that the deaths did result from contamination of Abbott's intravenous solutions. The grand jury was at liberty to indict if it concluded that there

was probable cause to believe the existence of the fact; the ultimate determination of the fact would be made at trial.

Defendants were also indicted under 21 U.S.C. § 331(a), which prohibits the introduction of any drug "that is adulterated or misbranded." While § 331(a) prescribes a crime of which scienter is not a necessary element, it does not follow that, in addition to Abbott, every employee of Abbott would have potential criminal liability; rather, only those who share in the responsibility of distributing adulterated or misbranded drugs in interstate commerce are potentially criminally liable. United States v. Dotterweich, 320 U.S. 277, 281, 284 (1943); United States v. Park, — F.2d — (4 Cir., June 28, 1974). "Responsibility" in turn depends upon knowledge, and if knowledge is established it depends further on the action or non-action of the officer or employee after he has obtained knowledge. Thus, we think that an inquiry to Mr. O'Donnell of whether he

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

No. 3897 CRIM.

UNITED STATES OF AMERICA, *Plaintiff,* v. ABBOTT LABORATORIES, a corporation, HERBERT M. GROSS, CLARENCE J. ENDICOTT, ROBERT T. O'DONNELL, ROBERT H. OTTO, and HARRY W. HOWELL, individuals, *Defendants.*	MEMORANDUM OPINION and ORDER

Filed Dec. 17, 1973, John R. Whitty, Clerk, U.S. District Court, E. Dist. No. Car.

LARKINS, *District Judge:*

This cause is now before this Court on defendants' separate motions to dismiss the indictment on two grounds:

(1) That they cannot receive a fair trial because of prosecution inspired, false, and inflammatory publicity which imputed either nine deaths or 50 deaths to the defendants, which the prosecutors knew were not a factor in the trial of the case.

(2) That they are entitled to have the indictment dismissed because of prosecutorial misconduct before the grand jury.

The defendants argue in support of their motion to dismiss because of prejudicial pre-trial publicity that a fair

trial has been precluded by the prosecution's deliberate nationwide dissemination of highly inflammatory and prejudicial publicity, unsupported in fact. Defendants contend that because the indictment consists of allegations of sixty (60) misdemeanors under a statute which requires proof neither of intent nor of knowledge, the agents of the Department of Justice and of the Food and Drug Administration engaged in shocking misconduct by releasing statements to the press which raised the specter of homicide by imputing to the defendants the deaths of either nine (9) or fifty (50) persons while knowing that the charges were without substantiation and not a factor in the impending trial.

The Government denies any prosecutorial misconduct and points out that the conduct and publicity complained of occurred subsequent to the return of the indictment. Therefore, prosecution argues, the indictment itself is considered to have been legally and properly procured by the government because the defendants have not alleged that the prosecutors poisoned the minds of the grand jury by generating false and misleading pre-indictment publicity.

Furthermore, the Government contends that defendants' argument that prejudicial publicity has denied them the constitutionally guaranteed right to a fair trial is premature because no trial date has been set nor has the question of venue been reached. The Government also charges that the defendants were not hurt by this publicity in this district.

In a separate motion to dismiss the defendants move to have the indictment dismissed on the grounds of prosecutorial misconduct before the grand jury. Defendants claim that even though the government admits that deaths are in no way involved in this case, the prosecutors repeatedly flaunted the stories of deaths before the grand jury; and that this was done in such a manner as to inflame unduly the members of the grand jury, and thereby created such bias in the grand jury that the indictment is inherently suspect and should be dismissed.

The Government denies any and all allegations of misconduct regarding the presentation of this case to the grand jury. The Government contends that the defendants have failed in their burden to show irregularity attendant to the grand jury proceedings. Furthermore, the Government does not concede that the subject of septicemia, possible deaths, and illnesses are irrelevant in this case.

THE FACTS

Proceedings in this case began being conducted before the grand jury of the United States District Court for the Eastern District of North Carolina on January 23 and 24, 1973, in Raleigh, North Carolina. The investigation continued on May 7, 1973 and May 29, 1973. With the exception of May 29th, complete transcripts were made of all the proceedings.

The transcripts reveal that the proceedings before the grand jury were being routinely conducted until the examination of Robert O'Donnell, one of the present defendants in this case. Up until the questioning of Mr. O'Donnell the Government had not raised the issue of deaths in connection with this case. On examining Mr. O'Donnell, Mr. Howard S. Epstein, one of the special prosecutors of the Department of Justice, posed the following questions:

> "Q. My recollection is, and I think that you can help me with that, they had a couple of dead bodies in Denver from Abbott I.V. solutions, isn't that right?" (Grand Jury Transcript, page 187)
>
> • • •
>
> "Q. Let's see now if we can refresh your recollection with exactly what was at the Henry Ford Hospital in Detroit. I want to show you a photocopy of what is captioned the Detroit Newspaper of March 14, 1971, with the headline that says: Faulty Bottle Caps Blamed in Nine Deaths, the Detroit Free Press of March 16, 1971 Eight Hospital Deaths tied to Tainted

Bottle Caps, March 16, 1971, Detroit Free Press: Painstaking Search Leads to Guilty Bottle Cap, and on March 17, 1971, from the Detroit News: Hospital Blood Poison Deaths were Linked to Water, and the Detroit News of March 17, Identities of Tainted Fluid Victims Withheld. Let me see if this will help you refresh your recollection about Henry Ford Hospital in Detroit?" (Grand Jury Transcript, pages 187-188)

* * *

"Q. Did she tell you the Detroit News were crazy as bed bugs that there was these dead bodies in Detroit from using Abbott I.V. Solutions." (Grand Jury Transcript, page 190)

On May 29, 1973 the grand jury investigation continued with testimony from John Bennett, M.D., Center for Disease Control in Atlanta. The prosecution stated it did not have a Court Reporter available to transcribe his testimony because Dr. Bennett had a terminal illness in his family which required his immediate return to Atlanta.

The prosecutors appeared that day with a prepared indictment naming the five individuals in addition to Abbott Laboratories, which had been concurred in or approved by the Food and Drug Administration through Mr. Peter Hutt. After the testimony of Dr. Bennett the prosecutors discussed the proceedings with the grand jury. Mr. Charles R. McConachie, the other special prosecutor of the Department of Justice, admitted that deaths were probably mentioned to the grand jury during the discussion of the recommended indictment.

Shortly after noon, of that same day, the grand jury returned an indictment charging the defendants with sixty (60) misdemeanors. These sixty (60) counts alleged that the defendants caused to be introduced and delivered for introduction into interstate commerce adulterated and misbranded drugs in violation of the Federal Food, Drug, and Cosmetic Act.

Prior to May 29, 1973, a press release naming the defendants and the charges had been prepared by the Department of Justice in Washington, D. C. This press release was brought to the United States Attorney's office in Raleigh by Mr. Howard Epstein and Mr. Charles R. McConachie. The press release was to be retyped in the United States Attorney's office and issued to the news media as soon as the Indictment was returned.

After noon, on May 29, 1973, the United States Attorney's office notified various news media of the press release concerning the Indictment. Channel 5, WRAL-TV, a Raleigh television station requested an interview which was granted. Ms. Lorraine Moore, a WRAL-TV reporter, arrived with a cameraman for the interview that same afternoon at about 2:00 p.m. The interview was with Mr. Thomas P. McNamara, United States Attorney, but Mr. Epstein and Mr. McConachie were also present. Arriving a few minutes later was Mr. Arthur Levine, an attorney with the Federal Food and Drug Administration.

Before the taped interview began, Mr. McNamara, as is his custom, had Lorraine Moore submit the questions to be asked for his study and inspection. There was not a question involving injury, illness, or death. During this time, Ms. Moore asked if any deaths or illnesses were attributed to the misbranded drugs. Mr. Epstein, the government attorney who is apparently in charge of the prosecution of this case, indicated yes, "the Center for Disease Control in Atlanta previously reported that nine deaths occurred in 1971."

In the taped interview before the camera Mr. McNamara was apparently surprised by Ms. Moore's final question, which was the same question concerning deaths and illnesses answered by Mr. Epstein. However, Mr. McNamara replied that "the Indictment had nothing to do with any deaths." There is also evidence to indicate that Lorraine Moore continued to ask questions concerning deaths and ill-

nesses. This, of course, was off camera. She apparently received answers to some, but not all, of these questions.

Later the same day, on the WRAL-TV six o'clock evening news, the news report concerning the Indictment in this case began with the following sentence:

> "Nine deaths and four hundred illnesses have been attributed to contaminated drugs made by a North Carolina Company."

The announcer, Charlie Gaddy, went on to add that "the drugs were manufactured by the Abbott Laboratories Hospital Products Division of Rocky Mount." He also mentioned that five individuals were indicted along with the Abbott corporation, however the individuals were not named. The interview with Lorraine Moore followed, however, Mr. McNamara's statement that the "deaths had nothing to do with the Indictment" was not shown to the television viewers.

That afternoon and evening the Indictment and the "nine death story" received extensive coverage, throughout the entire country, on radio, television, and in the newspapers. However, the dissemination of the "nine death story" cannot be entirely attributed to the remark made to Ms. Moore by Mr. Epstein. At approximately the same time Mr. Epstein was talking to Ms. Moore, a United Press International wire story was released from Washington, D. C., reporting the Indictment and containing the "nine death story." Thus, while Mr. Epstein's remark concerning deaths and illnesses can be directly attributed to the WRAL-TV news report, it was not the source of the nationwide dissemination of the "nine death story." However, the United Press International wire story expressly stated that the Department of Justice was the source of this story.

Also released to the news media that afternoon after the WRAL-TV interview was another news report concerning the Indictment and the defendants. The source of this news

story was the Federal Food and Drug Administration (F.D.A.) of the United States Department of Health, Education, and Welfare. The F.D.A. is the agency that recommended this prosecution to the United States Attorney for the Eastern District of North Carolina. This F.D.A. press release stated:

> "The Center for Disease Control, Atlanta, Georgia, reported 50 deaths from 412 patient episodes during late 1970 and early 1971 from Septicemias (blood poisonings) which CDC determined to be associated with the use of contaminated Abbott intravenous solutions."

The release noted that an F.D.A. and C.D.C. inspection "revealed the presence of the contaminating bacteria in the plant environment." It then stated "the presence of these bacteria in the product was due to the inadequacy of Abbott's closure system for the product," giving a brief description. It concluded by naming the five individual defendants and stating the following:

> "These individuals held positions of responsibility with respect to the adulteration and misbranding for the intravenous drugs named in the Indictment."

This "fifty death story" received much greater nationwide coverage than did the "nine death story."

At the conclusion of the WRAL-TV press interview, Mr. Arthur Levine first phoned Mr. Peter Barton Hutt, assistant general counsel of the Food and Drug Administration, and informed him of the Indictment. Although the F.D.A. does not issue a press release in every case, Mr. Hutt and Mr. Levine had prepared one in this case on May 24, 1973, five days before the Indictment was handed down. Mr. Hutt instructed Mr. Levine to call Mr. Jack Walden, Deputy Assistant Commissioner for Public Affairs of the F.D.A., concerning the agency's press release in this case. Mr. Walden was in charge of publicity and he had possession of the press release prepared by Mr. Hutt and Mr. Levine.

The Indictment was confirmed by Mr. Levine and Mr. Walden prepared to issue the press release.

Before issuing the press notice Mr. Walden decided to contact the Center for Disease Control and update the information on deaths and injuries which was included in the press release prepared by Mr. Hutt and Mr. Levine. The Center for Disease Control, a federal agency, gave Mr. Walden the figures of 5 deaths and 412 injuries. With the exception of a scientific seminar by C.D.C.'s technical personnel and a scientific article then under publication by C.D.C., Mr. Walden was the first to obtain these figures for nationwide publicity. Mr. Walden, who is not an attorney, updated the number of deaths and injuries mentioned in the press release prepared by Mr. Hutt and Mr. Levine and issued it to the news media late in the afternoon of May 29, 1973.

Hearings were held before this Court in New Bern, North Carolina, on defendants' motion to dismiss because of prejudicial publicity on August 2-3, 1973, and on September 12, 1973, the Court conducted an extensive inquiry with all parties present, into the activities of the government attorneys before the grand jury and after the indictment. This opinion is the result of these hearings and consideration by the Court of briefs, memoranda, affidavits, and numerous exhibits submitted by the parties in this case.

CONCLUSIONS OF LAW

The defendants were originally ordered to appear for arraignment before this Court on July 16, 1973, at New Bern, North Carolina. The offenses charged in this Indictment are "minor offenses" in that the penalty for each "does not exceed imprisonment for a period of one year, or a fine of not more than $1,000, or both," Title 18, U.S.C., Section 3401(f) and, therefore, may be tried before a United States Magistrate under Title 18, U.S.C. Section 3401(a), as provided for by General Rule 19 of the Local Rules of the United States District Court for the Eastern District of North Carolina.

Special prosecutor Charles R. McConachie acknowledged that the Government did consider bringing this case before a magistrate. He stated:

> "Obviously when we first got into this we did think about the possibility of filing a complaint before the Magistrate . . ." Hearing Transcript, September 12, 1973, page 144.

However, the Government abandoned this idea and brought the case directly before this Court.

Rule 1.J of the United States District Court for the Eastern District of North Carolina adopts as the rules of this Court the American Bar Association's Code of Professional Responsibility. The Disciplinary Rules of the A.B.A. Code provides, concerning "Trial Publicity," that:

> "(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:
>
> • • •
>
> (6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case." DR 7-107(B)(6), ABA Code of Professional Responsibility.

Furthermore, the Government prosecutors in this case are under the rules of the Department of Justice, 28 C.F.R. 50.2, which provide:

"(b) Guidelines to criminal actions.

> (1) These guidelines shall apply to the release of information to news media from the time a person is

the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise.

(2) At no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant's trial, nor shall personnel of the Department furnish any statement or information which could reasonably be expected to be disseminated by means of public communication, if such a statement of information may reasonably be expected to influence the outcome of a pending or future trial.

(3) . . . Disclosures should include only incontrovertible, factual matters and should not include subjective observations. In addition, where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public.

(4) . . .

(5) Because of the particular danger of prejudice resulting from statements in the period approaching and during trial, they ought strenously to be avoided during that period. Any such statement or release shall be made only on the infrequent occasion when circumstances absolutely demand a disclosure of information and shall include only information which is clearly not prejudicial.

(6) The release of certain types of information generally tends to create dangers of prejudice without serving a significant law enforcement function. Therefore, personnel of the Department should refrain from making available the following:

• • •

(iii) Reference to investigative procedures such as fingerprints, polygraph examinations, ballistic tests, or laboratory tests, or to the refusal by the defendant to submit to such tests or examinations.

* * *

(v) Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial.

(vi) Any opinion as to the accused's guilt, or the possibility of a plea of guilty to the offense charged, or the possibility of a plea to a lesser offense."

This Court finds as a fact that prejudicial pre-trial publicity was disseminated to the press by Special prosecutor Epstein, by the Department of Justice, and by the Food and Drug Administration. While 28 C.F.R. applies to the Department of Justice, the actions of F.D.A. officials Hutt and Levine, both attorneys, are governed by the rules of this Court and the A.B.A.'s Code of Professional Responsibility. The F.D.A. is the agency that recommended prosecution in this case. Mr. Levine worked very closely with Mr. Epstein and Mr. McConachie for an extended period of time. He reported directly to Mr. Hutt informing him of the progress of the case. Mr. Epstein and Mr. McConachie testified that they were aware the danger of possible prejudicial pre-trial publicity, as did Mr. McNamara who tried to prevent it.

Yet Mr. Hutt and Mr. Levine prepared a press release in this case five (5) days before the Indictment was handed down which mentioned deaths in connection with this misdemeanor case. Furthermore, Mr. Levine was present at the WRAL-TV press interview when Mr. McNamara admonished Ms. Moore that "the Indictment had nothing to do with the deaths." Nevertheless Mr. Levine proceeded to contact Mr. Hutt and Mr. Walden concerning the issuance of a F.D.A. press release, which he helped prepare, and,

therefore, knew to contain information involving deaths, injuries, and this misdemeanor indictment.

Mr. Hutt admitted in open court that the F.D.A. press release was issued because he was being "hounded" by the press and that there were "enormous" press inquiries. However, Mr. Hutt contends that the press release was not done in some type of conspiracy with his colleagues from the Department of Justice. This is not an issue because there did not have to be a conspiracy between the F.D.A. and the Department of Justice for the defendants to be unduely prejudiced by pre-trial publicity.

The plaintiff in this case is the Government. The Department of Justice, F.D.A., and C.D.C. are departments and agencies of the Government. The oneness of these departments and agencies can be seen in their working relationship. The F.D.A. recommended that this action be brought against Abbott Laboratories and Mr. Levine selected the place that the charges were to be brought. The Department of Justice insisted that the five individuals be included as defendants. Mr. Epstein stated he had difficulty in getting the F.D.A. to agree to the individuals but he subsequently prevailed. Mr. Levine of the F.D.A. worked "daily" with Mr. McConachie and Mr. Epstein of the Department of Justice. Mr. Epstein was in charge of the prosecution. Therefore, there did not have to be an overt conspiracy in this case, the actions of one are attributable to the other because they are part of the whole.

In this case, however, both the Department of Justice and the F.D.A. contributed its own "death story" thereby prejudicing the defendants. The F.D.A.'s "death story" just happened to be bigger and more detailed than the Department of Justice's. The F.D.A.'s "death story" also can be traced to definite individuals who were seeking publicity. Mr. Walden, F.D.A. Deputy Assistant Commissioner for Public Affairs, had worked with this case since 1971 and was very familiar with it. He stated in open court that

he "knew that the public interest and the press interest turned very much on the figures relating to deaths and injuries." This press release was not an effort to get Abbott Laboratories to remove alleged contaminated I.V. Solutions from the public, Abbott had recalled the product in question in March, 1971, two years before this "Fifty death" press release. Therefore, the F.D.A.'s press release was not made in the interest of public health and safety, it was self-serving in an effort to pacify a demanding press.

The present case, therefore, does not solely involve prejudicial publicity, it involves prejudicial publicity disseminated by a Government prosecutor, the Department of Justice, and the Food and Drug Administration. Dissemination by the prosecutor of "incompetent and prejudicial information about the case or the defendant," has been condemned in this Circuit. *United States* v. *Milanovich*, 303 F.2d 626 (4th Cir. 1962). The Court in *Milanovich* stated:

> "If the prosecutor, an officer of the court, is implicated in the dissemination of such information, the occurrence should be scrutinized with special concern." *Supra* at p. 629.

In *Milanovich*, the defendant raised the misconduct of the prosecutor as a technical matter, conceding that "by no possibility could the broadcasts have had any influence." In the present case, however, the press release contained hotly disputed and prejudicial information concerning deaths, which received nationwide coverage, and which continues to appear in the press whenever any action is taken in this case. The F.D.A. public relations officer who testified before this Court acknowledged that he knew that the "death" portion of the press release would be the most newsworthy aspect of the release. The prosecutors' conduct in this case is therefore far more opprobrious than the conduct condemned by the Fourth Circuit in *Milanovich*.

Three remedies less drastic than dismissal have been invoked in other cases: (1) voir dire; (2) a continuance; and

(3) change of venue. The government suggests that some or all of these remedies would purge the constitutionally suspect air in this case. Defendants contend that these remedies, individually and collectively, are inadequate. Because the prejudicial publicity was disseminated by the prosecutors, because it is reoccurring, and after a careful review of the opinions and facts in the relevant cases, this Court agrees with the defendants.

As to voir dire, the Supreme Court has recently made it clear that where improper publicity generated with the complicity of the state's officers has infected the community and relates directly to the case to be tried, voir dire cannot adequately protect the defendants. *Groppi* v. *Wisconsin*, 400 U.S. 505, 27 L.Ed2d 571 (1971); *Sheppard* v. *Maxwell*, 384 U.S. 333, 16 L.Ed2d 600 (1966); *Estes* v. *Texas*, 381 U.S. 532, 14 L.Ed2d 543 (1965); *Rideau* v. *Louisiana*, 373 U.S. 723, 10 L.Ed2d 663 (1963); *Pamplin* v. *Mason*, 364 F.2d 1 (5th Cir. 1966). In considering ways to assure the kind of impartial jury that the Constitution guarantees, the Supreme Court in *Groppi* stated:

> "Here we are concerned with the methods available to assure an impartial jury in a situation where, because of prejudicial publicity or for some other reason, the community from which the jury is to be drawn may already be permeated with hostility toward the defendant. The problem is an ancient one. Mr. Justice Holmes stated no more than a commonplace when, two generations ago, he noted that '(a)ny judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere.' Frank v. Mangum, 237 US 309, 349, 59 L Ed 969, 989, 35 S Ct 582 (dissenting opinion)." *Supra* at P. 510.

Viewing the facts and circumstances in this case in their totality, this Court finds that voir dire cannot be used to protect the defendants. The defendants have shown that

the prejudicial pre-trial publicity disseminated by the prosecutors' nine death statement to the television reporter in Raleigh, and the prosecutors' F.D.A. 50 death news release which stated other conclusions sufficiently infected the community so that voir dire cannot be used to guarantee the defendants' constitutional right to a fair trial.

The prosecutors intentionally, either by design, carelessness, or overzealousness, created the cloud of prejudicial publicity surrounding this case. This distinguishes this case from *Wansley* v. *Slayton*, ___ F.2d ___, No. 73-1151, (4th Cir., November 8, 1973), where the prejudicial publicity did not reach the press through the prosecutors.

Also the remedy of voir dire is inadequate because of the reoccurring publicity in the case. The "fifty death story" appeared in three Eastern North Carolina newspapers when the defendants were arraigned. It also appeared in the 1973 issue of the *FDA Consumer* for the month of September. Even if an impartial jury could be initially selected, the possibility of a juror recalling the prejudicial publicity and having to disqualify himself is tremendous. Therefore, under the circumstances in this case, a trial that used voir dire would be constitutionally suspect.

As to a continuance, the government contends that the mere passage of time will adequately protect the defendants, citing *Stroble* v. *California*, 343 U.S. 181 (1952); *United States* v. *Boucie* [*sic*], 360 F.2d 1 (2nd Cir. 1966), cert. denied, 385 U.S. 961 (1966); *United States* v. *Zovluck*, 274 F. Supp. 385 (S.D. N.Y. 1967); and *United States* v. *Armone*, 363 F.2d 385 (2nd Cir. 1966). However, these cases are readily distinguishable on their facts from the present case. In addition, all of these cases antedate *Barker* v. *Wingo*, 407 U.S. 514, 33 L.Ed.2d 101 (1972), in which the Supreme Court carefully analyzed the matter of unreasonable delay and laid down guidelines to be followed by trial courts. Defendants contend that a continuance will not

remedy the prejudicial pre-trial publicity released by the prosecutors, and that continued delay will deprive them of a right to a speedy trial. The Supreme Court in *Barker* v *Wingo*, *Supra*, in considering unreasonable delay in trials, adopted "a balancing test, in which the conduct of both the prosecution and the defendant are weighed." Using this test, this Court finds the government-generated publicity is the sole justification offered for delay. Furthermore, the 50 death story is in the "morgues" (files) of newspapers throughout the country, and undoubtedly will be referred to whenever this case is reported. This Court has previously noted that it was used in the Eastern District of North Carolina by at least three newspapers when they reported the arraignment of the defendants. Under the test of the *Barker* case, a continuance of this case would not only be improper but would also deny to the defendants their constitutional right to a speedy trial guaranteed them by the Sixth Amendment to the United States Constitution.

As to a change of venue, the government has not suggested that any district in the United States has not been infected with the government-inspired "nine death" and "fifty death" stories. Defendants have produced copies of some 225 newspaper articles, and transcripts of numerous network and local television and radio news reports which picked up the government's nine and fifty death releases. Under these circumstances, this Court finds a change of venue would be a useless gesture.

The only appropriate remedy is dismissal. This is, of course, an extreme penalty to impose on the government. It is, however, imposed because the government, through two of its separate agencies, solely generated the prejudicial publicity. As powerful and efficient as our government is, or can be, its laws and procedures do not have to be prostituted by prejudicial publicity "leaked" to the press in order to obtain convictions, especially criminal misdemeanor convictions.

This case is clearly distinguishable from *United States v. Mitchell, et al.*, 73 CR. 439 (S.D.N.Y., September 1, 1973), cited by the prosecution, in at least four respects:

1. There is no allegation that the *Mitchell* publicity was false.

2. In *Mitchell* the nationwide publicity could not be attributed to the government prosecutors.

3. In *Mitchell* the Senate committee on which the publicity was centering had agreed to avoid the issues covered in the indictment; here the publicity is concerned solely with the indictment and creates a constitutionally suspect situation by emphasizing deaths.

4. The publicity referred to in *Mitchell* related to matters primarily outside the indictment; here the government generated publicity focused directly on the indictment and the issues to be tried.

For these reasons, this Court was not able to hold as the Court did in *Mitchell* concerning prejudicial publicity.

The second motion considered by this Court involves alleged prosecutorial misconduct before the grand jury. In an Order dated September 12, 1973, this Court denied defendants' motion under Rule 6(e) to inspect or copy the entire grand jury transcript because they had not made a proper showing of probable misconduct before the grand jury. However, in that same opinion and order discovery of defendant O'Donnell's testimony was allowed under Rule 16.

The present motion to dismiss was filed by the defendants subsequent to the Rule 6(e) and Rule 16 discovery motion. In considering the instant motion the court has carefully studied the grand jury transcripts, briefs and memoranda of law submitted by both parties, and the hearing transcripts, in order to view the circumstances concerning the grand jury in their totality.

This Court is well aware that a grand jury proceeding is not bound by the ordinary rules of evidence and that a prosecutor has rather broad authority as to what may or may not be presented to the grand jury for its consideration. This authority is not boundless, however, and it is clear that a prosecutor exceeds the bounds of his authority when he introduces to the grand jury, by his questions or remarks, extraneous and irrelevant evidence, the primary purpose of which is to inflame and create bias. When this occurs there is no way to ascertain whether proper evidence or the prejudicial conduct of the prosecutor or both prompted the grand jury's action.

> "It is the duty of the prosecutor not to inflame or otherwise improperly influence the jurors against any person." *United States* v. *DiGrazia,* 213 F. Supp. 232 (N.D. Ill., 1963)

The judiciary is the citizen's only bulwark to protect against the tyranny of zealous prosecutors. In *DiGrazia, Supra,* the Court in dismissing the indictment quoted an admonishment from Justice Brandeis:

> "(T)he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

This Court finds as a fact that bias and prejudice were created when Mr. Epstein repeatedly referred to deaths and "dead bodies," and exhibited headlines of a newspaper story in a Detroit newspaper, which referred to deaths from Abbott I.V. solutions. Deaths were also mentioned on the day the grand jury returned the Indictment, to what extent they were mentioned is unknown because there was no transcript made of that last meeting. To raise the spector of homicide before the grand jury in an effort to obtain an indictment under an act which requires no *mens rea* is unconscionable conduct.

In view of all of the evidence, this Court concludes that dismissal is the only appropriate remedy.

Accordingly, the indictments and all counts thereof are dismissed as to all defendants.

NOW THEREFORE, in accordance with the foregoing, it is

ORDERED, that defendants' motion to dismiss on the grounds of prejudicial pre-trial publicity be, and the same is, hereby, ALLOWED, and

FURTHER ORDERED, that defendants' motion to dismiss because of prosecutorial misconduct before the grand jury be, and the same is, hereby ALLOWED, and

FURTHER ORDERED, that the indictments and all counts thereof are DISMISSED as to all defendants, and

FURTHER ORDERED, that the Clerk shall serve copies of this ORDER upon counsel of record.

Let this ORDER be entered forthwith.

JOHN D. LARKINS, JR.
John D. Larkins, Jr.
United States District Judge

Trenton, North Carolina
December 13, 1973

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-699

ABBOTT LABORATORIES, A CORPORATION

HERBERT M. GROSS, CLARENCE J. ENDICOTT, ROBERT T. O'DONNELL, ROBERT H. OTTO, AND HARRY W. HOWELL, INDIVIDUALS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A), as revised to reflect changes in pages 15, 19 and 20 of the slip opinion originally issued (Pet. App. B), is reported at 505 F. 2d 565. The opinion of the district court (Pet. App. C) is reported at 369 F. Supp. 1396.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1974. A timely petition for rehearing *en banc* (Pet. App. B) was denied on November 5, 1974. The petition for a writ of certiorari was filed on December 4, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court should have conducted a *voir dire,* or granted a continuance or a change of venue, before dismissing an indictment charging violations of the Federal Food, Drug, and Cosmetic Act of 1938, because of allegedly prejudicial pretrial publicity.

2. Whether references by government attorneys before a grand jury investigating the distribution of allegedly adulterated and misbranded intravenous solutions, to reports of deaths and illnesses associated with their use, warranted dismissal of the indictment.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND CANONS INVOLVED

The Sixth Amendment to the Constitution is set forth at Pet. 3. Rule 1J of the Rules of the United States District Court for the Eastern District of North Carolina, Disciplinary Rule 7–107(B) of the American Bar Association Code of Professional Responsibility and 28 C.F.R. 50.2(b) are set forth at Pet. 3–5.

Section 301 of the Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1042, as amended, 21 U.S.C. 331, provides:

> The following acts and the causing thereof are prohibited:
>
> (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

Section 502 of the Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1050, as amended, 21 U.S.C. 352 provides:

> A drug * * * shall be deemed to be misbranded—
>
> * * * * *
>
> (j) If it is dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof.

STATEMENT[1]

In December 1970, the Center for Disease Control (CDC), an agency of the United States Public Health Service, commenced an investigation into reports of an increase in the incidence of septicemia (blood poisoning) among hospital patients.[2] The preliminary results of this investigation were described in the

[1] The facts, as supplemented by the record references herein, are taken largely from the opinions of the district court and the court of appeals.

[2] The primary mission of the Center for Disease Control is to monitor, investigate and research the cause, spread and control of infectious diseases. It is also charged with the responsibility of disseminating to the health care community information obtained through its investigation and research. To this end, CDC issues a weekly report, "Morbidity and Mortality Weekly Report," in which it summarizes its data, issues warnings on possible health hazards and suggests methods of treatment.

March 12, 1971, issue of the Center's nationally distributed "Morbidity and Mortality Weekly Report." The Report stated that 150 cases of blood poisoning and nine deaths had occurred between October 1970 and March 1, 1971 in eight separate hospitals, each of which made exclusive use of intravenous fluids and systems manufactured by Abbott Laboratories. The Report also stated that bacterial contamination had been found in the cap liner of unopened Abbott I.V. bottles which could enter the fluid when the caps were opened and replaced in the course of normal hospital usage. The Report warned "that special precautions must be taken in hospitals, nursing homes, and other health care facilities to reduce the risk of septicemia from the use of Abbott Laboratories intravenous (IV) infusion products" (J.A. 150a–151a).[1] The CDC Report received national news media coverage, including a March 29, 1971 "Newsweek" magazine article entitled "A Case of Bottled Death," which described the illnesses and deaths reported by the CDC and set forth in detail the isolation of "the guilty" germ in the cap liner of the Abbott I.V. bottle (J.A. 148–149).

Following publication of the CDC Report and the resulting publicity, the Food and Drug Administration (FDA) commenced an investigation to determine whether the Federal Food, Drug and Cosmetic Act had been violated. A federal grand jury in Raleigh, North Carolina, heard the evidence gathered by FDA and the Department of Justice, including the testimony of several Abbott employees. On three occasions during the course of the grand jury investigation, the

[1] "J.A." refers to the Joint Appendix filed in the court of appeals.

possibility that some persons had died as a result of using adulterated Abbott products was mentioned. The first reference to reports of possible deaths was apparently made by one or more preliminary witnesses during their testimony (Pet. App. A, p. A–6). The second occurred during the examination of petitioner Robert O'Donnell, Abbott's Director of Quality Assurance, who was asked about the reaction of various Abbott employees to the reports showing greater numbers of blood poisoning cases in hospitals. During this questioning he was also asked if he had heard about any deaths resulting from the use of Abbott products (Pet. App. A, p. A–6).[4] The third reference to reports of deaths was during the prosecutor's discussion of the proposed indictment on the day the grand jury returned the indictment. (*ibid.*)

On May 29, 1973, the grand jury returned a sixty count indictment charging Abbott Laboratories and five of its current or former employees, including Robert O'Donnell, with causing the introduction into interstate commerce of adulterated and misbranded intravenous solution drugs, in violation of Section 301(a) of the Federal Food, Drug and Cosmetic Act of 1938, 21 U.S.C. 331(a) (J.A. ~~62–92~~). The drugs were alleged to be adulterated because they did not meet official United States Pharmacopeia standards of purity to which they purported to comply (21 U.S.C. 351(b)), and because the methods used in their

[4] The transcript reveals that the questions by the prosecutor on this point were propounded in the context of probing an obviously recalcitrant witness. See Pet. 8–9; Pet. App. C, pp. C–3 to C–4.

manufacture did not conform with current good manufacturing practice to insure that the product would meet the standards of quality and purity claimed by the product (21 U.S.C. 351(a)(2)(B)) (J.A. 8a–17a). They were alleged to be misbranded because their labelling claimed they were sterile when they were not (21 U.S.C. 352(a)), and because the drug was dangerous to health when used as prescribed in the labelling (21 U.S.C. 352(j)) since contaminating micro-organisms would be transmitted from the bottle to the patient (J.A. 18a–27a).

Shortly after the indictment was issued in Raleigh, the Department of Justice in Washington, D.C., and the United States Attorney's office in Raleigh issued separate but similar press releases (J.A. 124a–127a). These releases did not say that deaths were associated with Abbott I.V. solutions, but shortly thereafter a Raleigh news reporter interviewed the United States Attorney and two Department of Justice attorneys and asked whether any people had become sick or died from administration of the Abbott I.V. solutions. One of the Department of Justice attorneys responded by noting the fact that the "Mortality and Morbidity Weekly" had reported in March, 1971, that there had been nine deaths associated with the use of Abbott I.V. fluids (Pet. App. A, p. A–4). While this interview was still in progress, United Press International (UPI), a news wire service, reported that the grand jury had returned criminal indictments involving allegedly contaminated intravenous fluids linked to nine deaths and hundreds of injuries (J.A.

157a–159a). UPI attributed this story to a Justice Department announcement (Pet. App. A, p. A–4).[5]

After the indictment was returned, FDA issued a statement in the form of a Note to Correspondents (J.A. 128a–129a). The Note contained information substantially identical to that originally released in the CDC Report of March 12, 1971. However, prior to the issuance of the Note, an FDA official asked CDC to verify the information in the Note. He was informed that CDC had revised its figures relating to the number of deaths and illnesses associated with the use of the Abbott I.V. solution. On the basis of this revised information and without notifying the government attorneys involved in the case, the FDA official revised the Note to reflect the new data (Pet. App. C, p. C–8). Therefore, the FDA note refers to 50 deaths being associated with the use of the Abbott I.V. solution, rather than nine. The Note also stated that the individuals named in the indictment "held positions of responsibility with respect to the adulteration and misbranding of the intravenous drugs named in the indictment" (Pet. App. A, p. A–5).

1. Proceedings in the District Court

Petitioners filed two separate motions to dismiss the indictment. The first alleged that the various statements of government officials after the return of

[5] Attributing this story to a Department of Justice announcement was incorrect. Affidavits in the record submitted by Department of Justice personnel show that the Department made no announcement which made any reference to deaths being associated with the Abbott solutions (J.A. 762a).

the indictment were highly inflammatory, prejudicial, and denied them their constitutional right to a fair trial. Attached to this motion were a number of exhibits showing that the "9 death" and the "50 death" stories had been reported in a number of different newspapers and mentioned in several radio and TV broadcasts (J.A. 49a–122a).[6]

The second motion sought to dismiss the indictment on the ground that the conduct of the Department of Justice attorneys in presenting the case to the grand jury was "prejudicial and inflammatory" because, in the defendants' view, deaths were not relevant to the offenses described in the indictment, but the possibility that persons had died as a result of using the Abbott I.V. solution had been mentioned to the grand jury (Pet. App. A, p. A–7).

The district court granted both motions to dismiss. Without attempting to impanel a jury, the court concluded that the news reports issued at the time the indictment was returned had prejudiced the community from which the jury would be selected to such a degree that a *voir dire* would not adequately protect the defendants' constitutional right to a fair trial (Pet. App. C. pp. C–14 to C–15). The court further determined that a continuance would not protect the defendants' right to a fair trial because of the recurrent nature of the prejudicial publicity and because it would deny the defendants' right to a speedy trial (Pet. App. C, pp. C–15 to C–16). The court also stated

[6] Petitioners also disputed the accuracy of the CDC data.

that a change of venue would be a "useless gesture" because of the nationwide publicity given to the indictment (Pet. App. C, p. C–16). Finally, the district court granted the second motion to dismiss on the ground that the prosecutor exceeded his authority by introducing "by his questions or remarks [before the grand jury], extraneous and irrelevant evidence" relating to deaths from Abbott I.V. solutions (Pet. App. C, p. C–18).

2. Proceedings in the Court of Appeals

The court of appeals reversed. While the court disapproved certain conduct by the government with regard to prejudicial pretrial publicity (Pet. App. A, p. A–9), it held that the district court should not have dismissed the indictment without first attempting by means of a *voir dire* examination to select an impartial jury. The court stated that in cases involving prejudicial pretrial publicity the important question is "whether fairness to defendants may still be accomplished and not whether misconduct of the government warrants punishment which also forfeits the rights of society" (Pet. App. A, p. A–9). Referring to this Court's opinion in *Rideau* v. *Louisiana*, 373 U.S. 723,[7] the court noted (Pet. App. A, pp. A–10 to A–11):

> Whatever may be the ultimate implications of *Rideau*, we do not think that in this case the district court's finding that voir dire could

[7] Petitioners continue to rely primarily on *Rideau* in this Court, as they did in the courts below. See Pet. 10–16.

> not be used to guarantee defendants' right to a fair trial can be sustained. * * * In sum, we hold that, although in a proper case *Rideau* may not require resort to voir dire and proof of the results thereof as proof essential to a finding that a defendant may not receive a fair trial so as to warrant dismissal of an indictment, such proof is essential in the instant case. Consequently, the district court's finding that a fair trial was impossible and its legal conclusion that the indictment should be dismissed cannot stand, since voir dire was not employed.

Because of its conclusion in regard to the failure of the district court to make use of *voir dire*, the court of appeals discussed only briefly the efficacy of a continuance and a change of venue to protect the defendants' right to a fair trial in these circumstances. While the court recognized that a change of venue cannot be ordered without the defendants' consent, and that a continuance may present speedy trial problems if the defendants object, the court believed that the availability of these two additional remedies places a heavy burden on the defendants to show the ineffectiveness of these remedies as alternatives to dismissal of the action (Pet App. A, pp. A–11 to A–12).

Finally, the court concluded that the indictment should not have been dismissed because reports of deaths were mentioned during the grand jury proceedings. The court noted that evidence of deaths was relevant to the grand jury investigation because that evidence "would establish that the solutions were 'dangerous to health' " within the meaning of Section 502

(j) of the Act, 21 U.S.C. 352(j) (Pet. App. B, p. B–3). The court further indicated that evidence that deaths were associated with the use of Abbott products may be relevant at trial (Pet. App. B, pp. B–3 to B–4). The court concluded that there was no evidence in the record to support the district court's finding that the primary purpose of references to deaths before the grand jury was to arouse the prejudice of the grand jurors against the defendants; it held this finding by the district court to be "clearly erroneous" (Pet. App. A, p. A–14).

ARGUMENT

The judgment of the court of appeals, reversing the order of dismissal by the district court, is correct and is consistent with decisions of this Court. It therefore presents no issue warranting further review.

1. Petitioners argue that the pretrial publicity in this case created "an inherently suspect trial situation" (Pet. 2)[8] and that they would have been denied a fair trial if the district court had not dismissed the indictment. But there is no evidence in the record to support this conclusion because the district court did not conduct a *voir dire* examination of potential jurors in order to determine the effect of the publicity. Indeed, the district court failed to resort to any of the established techniques commonly used to protect

[8] This phrase, borrowed by petitioners from this Court's opinion in *Estes* v. *Texas*, 381 U.S. 532, was never used by the district court, presumably because the court, having refused to conduct a *voir dire* to determine what the prospective jurors had read and seen about the case and how the exposure to such publicity had affected them, had no basis for such a conclusion.

a defendant's right to a fair trial in cases involving allegedly prejudicial pretrial publicity. Moreover, the district court appears to have ruled, not on the basis of any finding of prejudice, but because of the court's belief that the prosecutors were the source of the pretrial publicity.

a. Historically, three methods have been used to protect a defendant's right to a fair trial in cases involving potentially prejudicial pretrial publicity: *voir dire*, change of venue, and continuance. See, *e.g.*, *Groppi* v. *Wisconsin*, 400 U.S. 505, 510–511. The most commonly used method, and in fact the method used in all civil and criminal cases to guarantee an impartial jury to both sides, is a *voir dire* examination of potential jurors. This method is especially effective in cases involving allegedly prejudicial pretrial publicity because it provides a means by which the district judge can accurately determine which, if any, potential jurors were exposed to the publicity and whether exposure to that publicity would affect their ability to be impartial.[9] The fact that an article con-

[9] As an example, after exhaustive *voir dire* examinations, impartial juries were selected in two of the most widely publicized cases in recent years. *United States* v. *Liddy*, C.A.D.C., No. 73–1565, decided November 8, 1974; *United States* v. *Mitchell*, 372 F. Supp. 1239, appeal dismissed, 485 F. 2d 1290. In the *Liddy* case, the original Watergate break-in trial, Chief Judge Sirica commented at one point that he believed that everyone had at least heard of or read something about the case. However, he was able to impanel an impartial jury in spite of this fact. In *Mitchell*, a criminal prosecution involving two former cabinet officials, an impartial jury was selected despite widespread publicity concerning the case. The jury subsequently acquitted the defendants. See also *United States* v. *Caldwell*, C.A.D.C., No. 72–1513, decided December 31, 1974.

cerning this case appeared in several newspapers does not prove that any potential jurors read the article or were prejudiced by it. The same is true of radio and television broadcasts concerning the case. Thus, without a *voir dire* examination of potential jurors, the district court in this case had absolutely no basis for determining that any potential juror was even aware of the pretrial publicity, much less prejudiced by it.[10]

This Court has decided a number of cases involving the effect of publicity upon a jury,[11] but in no case has this Court, or any federal court of appeals that has considered this problem,[12] held pretrial publicity to be so prejudicial that it forecloses forever all possibility of a fair trial without even attempting by *voir dire* to determine whether an impartial jury could be convened. These cases recognize the simple fact that given the constitutionally protected role of the news media in this country, publicity concerning law enforcement activities is both necessary and inevitable. The Constitution does not require "that the jurors be totally ignorant of the facts and issues involved."

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[10] See, *e.g.*, ABA Standards for Criminal Justice, *Fair Trail and Free Press* (Approved Draft, 1968), § 3.4; *United States* v. *Liddy*, *supra*, slip op., at pp. 8–13.

[11] See, *e.g.*, *Irvin* v. *Dowd*, 366 U.S. 717; *Beck* v. *Washington*, 369 U.S. 541; *Sheppard* v. *Maxwell*, 384 U.S. 333; *Rideau* v. *Louisiana*, 373 U.S. 723.

[12] See, *e.g.*, *Wansley* v. *Slayton*, 487 F. 2d 90 (C.A. 4), certiorari denied, 416 U.S. 994; *Pamplin* v. *Mason*, 364 F. 2d 1 (C.A. 5); *Blumenfield* v. *United States*, 284 F. 2d 46 (C.A. 8), certiorari denied, 365 U.S. 812; *United States* v. *Kahaner*, 204 F. Supp. 921 (S.D.N.Y.), affirmed, 317 F. 2d 459 (C.A. 2), certiorari denied, 375 U.S. 836.

Irvin v. *Dowd*, *supra*, 366 U.S. at 722. The important question is not whether there was prejudicial publicity, but whether, despite that publicity, the district court is able to impanel an impartial jury or take other steps necessary to protect the defendant's right to a fair trial. Here the district court refused even to make the effort.[13]

Petitioners rely on *Estes* v. *Texas*, *supra*, *Rideau* v. *Louisiana*, *supra*, and *Sheppard* v. *Maxwell*, *supra*, but in each of those cases the Court held that the defendant was entitled to a continuance or a change of venue, or that the trial itself had been infected by publicity. This case, on the other hand, involves dismissal of an indictment without any continuance, change of venue, *voir dire* or trial and without any evidence in the record to establish that it would be impossible—or even difficult—to select an impartial jury. Moreover, the news reports in this case are not comparable to the prejudicial publicity in *Estes*, *Rideau* and *Sheppard*; the reports here did not comment on the defendants' guilt or innocence, were not published on the eve of the trial or while the trial was in progress, and were not continuous, repetitive or virulent.[14] In fact, they did little more than repeat previously printed news reports stating that illness

[13] While petitioners are correct in pointing out that this Court has on occasion reversed convictions because of the effect of prejudicial publicity upon a jury, in each case the state was given the option of retrying the defendant in an atmosphere free from the prejudicial conduct surrounding the original trial. See, *e.g.*, *Estes* v. *Texas*, *supra*; *Sheppard* v. *Maxwell*, *supra*; *Rideau* v. *Louisiana*, *supra*.

[14] The district court's finding that *voir dire* would be inadequate because the publicity was reoccurring (Pet. App. C, p. C–15) is not

and death had been associated or linked with Abbott's products. On this record, there is no reason to believe that any vast numbers of persons read these reports, or that those who did read them were immediately and for all time prejudiced against Abbott and its employees or even that the readers would remember the reports for any significant amount of time. In fact, the passage of time between the appearance of the initial news reports in March 1971, the filing of the indictment and the resulting publicity in May 1973, the district court's dismissal of the indictment on December 13, 1973, and today is doubtless sufficient to

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supported by the record. In fact, all but three of the newspaper articles reporting the indictment appeared between May 29 and June 4, 1973 (J.A. 63a–69a, 49a, 50a) and reports of the arraignment, as noted by the district court (Pet. App. C, p. C–15) appeared in only three newspapers in Eastern North Carolina. Nowhere does the record reveal that, other than the few days surrounding the indictment and the three reports of the arraignment, there were any other newspaper, radio or television accounts of the indictment in North Carolina. Nor did the defendants present any evidence that the two-day hearing on their motion to dismiss resulted in any publicity in North Carolina.

The district court cited the appearance of a Food and Drug Administration news release in the September 1973 issue of the 'FDA Consumer' (*ibid.*). However, this is a publication not sold at newsstands, bookstores, or through other normal promotional channels; it is distributed by the Food and Drug Administration to persons and organizations who have expressed a particular interest in the activities of the Food and Drug Administration (Affidavit of Wayne L. Pines, J.A. 765a–767a). Of the few radio and television accounts of the indictment, only one contained a reference to any of the individual defendants and all these reports were broadcast on May 29 and 30 (J.A. 34a–42a, 92a–93a, 121a).

guarantee that even if any potential jurors were exposed to the news reports concerning this case, they no longer remember them. *Beck* v. *Washington, supra.*

Finally, even if a comprehensive *voir dire* examination indicates that a large number of potential jurors were prejudiced by exposure to the pretrial publicity, the district court has at least three other means available to protect the defendants' right to a fair trial. First, it could transfer the case to another location within the Eastern District of North Carolina. See *United States* v. *Addonizio*, 451 F. 2d 49 (C.A. 3), certiorari denied, 405 U.S. 936; Rule 18, Fed. R. Crim. P. Given the fact that only ten out of the fifty newspapers in North Carolina carried the news reports in question, the district court should be able to designate a place of trial which was not affected by these reports.[15] In addition, the district court could grant a continuance or a motion for a change of venue to another state.[16] As the court of appeals stated (Pet. App. A, p. A-12), the availability of these two additional remedies to a defendant seeking dismissal of an indictment on the ground of prejudicial pretrial publicity places a heavy burden on him to prove actual prejudice resulting from the publicity and the ineffectiveness of these or any other remedies to pro-

[15] The Eastern District of North Carolina encompasses 44 counties and regular sessions of the Court are held in Raleigh, Wilson, Fayetteville, New Bern, Washington, Elizabeth City, Wilmington and Clinton.

[16] The record indicates that there are ten states in which no newspapers carried accounts relating to the subject matter of this case (J.A. 49a–50a, 62a–63a).

tect his constitutional rights.[17] Of course, if an impartial jury can be selected after full *voir dire*, the district court would not have to consider these alternative remedies. However, the failure of the district court to resort to any of these established procedures was, as the court of appeals held, erroneous.

b. The fact that the prosecutors supplied information to the news media, which in any event was substantially identical to reports previously published, did not warrant dismissal of the indictment. If the district court is able to select an impartial jury and take whatever other precautions that are necessary to protect the defendants' right to a fair trial—steps which it has refused even to attempt in this case—then the defendants' constitutional rights have not been violated and dismissal of the indictment would not be justified.

2. The indictment in this case is not defective because the possibility that people had died as the result of receiving Abbott's intravenous solutions was mentioned before the grand jury. First, the evidence was relevant to the grand jury's investigation of possible violations by Abbott and its employees of the

[17] It is significant that neither Abbott nor any of its co-defendants ever requested a change of venue or a continuance. They defend their failure to do so (Pet. 16) on the ground that "[t]he Sixth Amendment precludes the necessity for seeking a change of venue. *Barker* [v. *Wingo*, 407 U.S. 514.] and the Sixth Amendment preclude the necessity for seeking a continuance." On the contrary, "[a] defendant who has unused means to protect his rights should not lightly be granted the extreme remedy of dismissal of the charges against him on less than a conclusive showing that the unused means would be ineffective" (Pet. App. A. p. A-12). See also *United States* v. *Caldwell*, *supra*, slip op., at pp. 11-13.

Federal Food, Drug, and Cosmetic Act of 1938. One possible violation of the Act which was within the scope of the grand jury's investigation was whether the Abbott intravenous solutions were misbranded within the meaning of Section 502(j) of the Act, 21 U.S.C. 352(j). That section states that a drug is misbranded "[i]f it is dangerous to health." Obviously, evidence that death or illness had resulted from the use of the Abbott solutions was relevant to establish a danger to health.[18] Moreover, the "validity of an indictment is not affected by the character of the evidence considered" and "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence * * *." *United States* v. *Calandra*, 414 U.S. 338, 344–345.

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[18] The grand jury could properly consider the reports of deaths, the knowledge that Abbott officials had of the reports and the actions they took in the light of the reports, as a means of illuminating their roles in the company and in the distribution of the intravenous solutions. It does not follow, however, that any given official's responsibility is dependent on his knowledge of these deaths. Indeed, *United States* v. *Dotterweich*, 320 U.S. 277, 281, makes clear that the Federal Food, Drug, and Cosmetic Act "dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing." For this reason, we were constrained, in our brief in *United States* v. *Park*, No. 74–215, to disagree with the statement of the court of appeals in this case (Pet. App. B, p. B–4) that "'[r]esponsibility' * * * depends upon knowledge * * *" (see Brief for the United States in *United States* v. *Park*, No. 74–215, pp. 15–16, 25).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1975.

CERTIORARI DENIED